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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-774

NATHAN BROCKSTEIN and MANUEL BROCKSTEIN, doing business as CHURCH AVENUE POULTRY,

Petitioners,

against

NATIONWIDE MUTUAL INSURANCE COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Summary of Argument

There is no legal basis for reviewing the decision of the court below.

Argument

None of the considerations which, under Rule 19 of the Rules of this Court, are to govern review on certiorari are present in the instant case. Clearly, there is no federal question; nor can it be urged by the petitioners that the Second Circuit has decided this matter against them in conflict with New York law. Moreover, the petitioners' efforts to contend (p. 5)* that the Second Circuit's deci-

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* References are to pages of the Petition.

sion is in conflict with the decision in other circuits is somewhat contrived.

As the Second Circuit stated in its second opinion (17a):

> ". . . on this record and after the careful sifting of the evidence by the district judge, we should reverse his finding of no bad faith only if the rule is that failure to notify an insured of his opportunity to contribute always requires a finding of bad faith. But this court did not go that far in our prior opinion or in the cases upon which we relied, *e.g., Young* v. *American Casualty Co.*, 416 F.2d 906 (2d Cir. 1969); *Brown* v. *United States Fidelity & Guaranty Co.*, 314 F.2d 675 (2d Cir. 1963). And we decline to adopt such a rule now."

and further (16a):

> "As we pointed out in our earlier opinion, 417 F.2d at 705, the ultimate issue before the judge was whether the insurance company dealt fairly and adequately with its insured under New York law. A finding of good faith or lack of bad faith is merely a shorthand way of resolving the series of issues embodied in that concept. When the trier of fact is convinced that under the applicable law the insurer on all the evidence did deal properly with its insured, we are not disposed to overrule that judgment."

It is clear from both the opinion of the Third Circuit in the *Lumbermens* case (419 F.2d 837), as well as the much lengthier opinion of the District Court which it was affirming (293 F.Supp. 541), and the opinion of the Fifth Circuit in the *American Liberty* case (423 F.2d 115) that both of these circuits are also applying the "lack of good faith" test and that no single error or omission on the part of the insurer is to be deemed controlling in all cases. Moreover, some disagreement among the circuits must

obviously be expected in this area, since these are diversity cases in which the varying laws of the several states are being applied.

Finally, the petitioners' reliance upon the opinions expressed by Moore, Cir. J., in his dissent (18a) is somewhat obscure, since it is clear that this judge would go far beyond the rules enunciated in any of the other cases, and impose a standard of absolute liability upon an insurance carrier who could have settled the case within the policy limits, but did not do so.

With respect to the opinion of the other judges, it is far more important to note that the petitioners did not see fit in this instance to apply for an *en banc* hearing by the Second Circuit.

CONCLUSION

The instant petition for a writ of certiorari should be in all respects denied.

Respectfully submitted,

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